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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KYLE NOWLING,

Defendant and Appellant.

D059252

(Super. Ct. No. SCD225846)

APPEAL from a judgment of the Superior Court of San Diego County, Michael Smyth, Judge. Affirmed and remanded with directions.

A jury found Kyle Nowling guilty of three counts of first degree robbery (Pen. Code, §§ 211, 213, subd. (a)(1)(A);¹ counts 1, 2 and 3); kidnapping (§ 207, subd. (a); count 4); and kidnapping for ransom (§ 209, subd. (a); count 5). As to counts 1, 4 and 5, the jury found Nowling had personally used a firearm. (§§ 12022.5, subd. (a), 12022.53, subd. (b).) The court sentenced Nowling to prison as follows: On count 5, life with the possibility of parole, plus 10 years for the section 12022.53, subdivision (b) enhancement

¹ All further statutory references are to the Penal Code.

and a stayed term for the section 12022.5, subdivision (a) enhancement;² and on counts 1 through 4, a 16-year determinate prison term to run concurrently with the indeterminate term. The determinate term consisted of the six-year middle term on count 1, plus 10 years for the section 12022.53, subdivision (b) enhancement and a stayed four-year middle term for the section 12022.5, subdivision (a) enhancement; concurrent six-year middle terms on counts 2 and 3; and the five-year middle term on count 4, stayed pursuant to section 654, with stayed terms of 10 years for the section 12022.53, subdivision (b) enhancement and the four-year middle term for the section 12022.5, subdivision (a) enhancement.

Nowling appeals, contending the sentence for kidnapping (count 4) should have been stayed pursuant to section 654 because the kidnapping arose from the same act as the kidnapping for ransom (count 5). The People concede the point. More importantly, the People correctly note the court orally stayed the sentence for kidnapping pursuant to section 654; the abstract of judgment and the minutes do not reflect that stay; and the court's oral statement takes precedence over the abstract and minutes (*People v. Mitchell* (2001) 26 Cal.4th 181, 185).

We affirm the judgment and remand the case to the trial court with directions to (1) choose the lower, middle or upper term for the section 12022.5, subdivision (a)

² The court was required to impose and stay sentence on the section 12022.5, subdivision (a) enhancement. (*People v. Gonzalez* (2008) 43 Cal.4th 1118.) Although the court properly stayed sentence on the enhancement, it did not specify its choice among the lower, middle and upper terms of three, four and 10 years for that enhancement. (§ 12022.5, subd. (a).)

enhancement on count 5 (*ante*, fn. 2); and (2) correct the abstract of judgment to reflect the section 654 stay of count 4.

DISPOSITION

The judgment is affirmed. The case is remanded to the trial court with directions to (1) choose the lower, middle or upper term for the section 12022.5, subdivision (a) enhancement on count 5 (*ante*, fn. 2); and (2) correct the abstract of judgment to reflect the section 654 stay of count 4. The court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.